

STATE OF MICHIGAN
COURT OF APPEALS

JAMES SOUPAL, GERI SOUPAL, ALAN HAY,
and SANDRA HAY,

UNPUBLISHED
February 28, 2003

Plaintiffs-Appellees/Cross-
Appellants,

v

SHADY VIEW, INC.,

No. 231443
Roscommon Circuit Court
LC No. 96-007522-CH

Defendant-Appellant/Cross-
Appellee.

Before: O’Connell, P.J., and Griffin and Markey, JJ.

O’Connell, J. (*dissenting*).

I respectfully dissent. Defendant’s use of its property is inconsistent with single-family zoning (R-1). To allow a twenty-slip marina and a community center on a parcel of property zoned for single families is directly contrary to the existing zoning ordinances.

I. INTRODUCTION

This case is controlled by the zoning issue specifically raised by plaintiffs’ cross-appeal. Defendant’s property is zoned R-1, single-family residential. While I am not prepared to conclude that all of the individual uses defendant makes of the property are inconsistent with single-family zoning, I do conclude that the combination of uses, including forming a corporation, soliciting funds, selling stock in the corporation, purchasing land, constructing a twenty-slip marina, using the existing structure on the land as a community center, and charging yearly dues to use the marina and the community center, are inconsistent with single-family zoning. Single-family zoning ordinances do not allow this combination of uses.

I also conclude that defendant’s potential to make a profit on the lakefront property and subsequently distribute this profit to its shareholders is a significant probability, especially because they have a twenty-slip marina permit issued by the Michigan Department of Environmental Quality as an asset of the corporation. By definition, marinas are for-profit operations. Thus, I would remand this case to the trial court for further proceedings consistent with the conclusion that defendant is in violation of the R-1 single-family zoning ordinance.

II. FACTS

Defendant Shady View, Inc., is a nonprofit Michigan corporation that formed in May 1996 for the purpose of operating and maintaining real property for recreational use. Defendant purchased two parcels of property on Higgins Lake in Roscommon County – one on the lakefront and the other adjacent to the rear of the lakefront lot. Defendant was authorized to issue twenty shares of stock, nineteen of which were sold to individual families who were “backlotters,” or people who owned lots that were not on the lake. Members of the marina (shareholders of the corporation) pay annual dues of \$300 for their exclusive use of the property with their guests. The property is zoned R-1, single-family residential. Defendant purchased the lakefront property specifically to erect a seasonal dock for use by its shareholders. To accommodate all of its shareholders, defendant built a dock that was 160 feet long with 20 boat slips. There is also a cabin on the premises that is used twice a year for defendant’s meetings and functions as a private community center for the members.

Plaintiffs James and Geri Soupal and Alan and Sandra Hay, neighboring lot owners, filed a complaint against defendant, alleging that defendant’s marina violated the Gerrish Township zoning ordinance. Plaintiffs also claimed it was a nuisance per se because it interfered with the reasonable use and quiet enjoyment of their property, and requested a preliminary and permanent injunction.

Following an extensive administrative and circuit court procedural history, defendant now appeals and plaintiffs cross-appeal.

III. APPLICABLE LAW

In my opinion, defendant’s use of the property is in violation of the R-1 single-family zoning ordinance. Consequently, the use is a nuisance per se, and the trial court properly enjoined defendant’s activity on the property.¹

When reviewing a zoning ordinance, the usual statutory construction rules apply. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). Gerrish Township zoning ordinance 6.1(d) establishes single-family residential zoning (R-1), and states that “[n]ot more than one home-occupation on each building lot” is allowed. See also ordinance 3.1 (a “home-occupation” is a use by residents of the dwelling and does not include endangerment of other residents in the area because of “noise, . . . unsanitary or unsightly conditions, excessive traffic . . . and the like . . .”). Ordinance 6.7(d) and (e) also prohibits “[a]ll enterprises of a commercial nature . . .” and “[c]abins or guest houses” on property zoned R-1.

Clearly defendant is in violation of the above ordinances with its multi-family, non-residential use of the property to sell shares and charge dues for recreational community center and marina services. This combination of uses, allowing up to twenty member families and watercraft to have ingress and egress to and from the property and the lake, is plainly not

¹ I note that this Court reviews the decision of a trial court in equitable actions de novo and reviews the trial court’s related findings of fact for clear error. *Cipri v Bellingham Frozen Foods, Inc (After Remand)*, 235 Mich App 1, 9; 596 NW2d 620 (1999).

consistent with single-family zoning. See *Kalinoff, supra* (unambiguous ordinance must be enforced as written).

Furthermore, the marina is of a commercial nature, in violation of ordinance 6.7(d). See also ordinance 3.1 (a “marina” is “[a] facility which is owned or operated by a person, extends into or over an inland lake or stream and offers services to the public or members of the marina for docking, loading, or other servicing of recreational watercraft.”). When construing words in a statute or ordinance, the “ordinary and generally accepted meaning” must be applied. *Tryc v Michigan Veterans’ Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). “Commercial” is defined as “able or likely to yield a profit.” *Terrien v Zwit*, 467 Mich 56, 63; 648 NW2d 602 (2002), citing *Webster’s Random House College Dictionary* (1991) and *Black’s Law Dictionary* (6th ed).

All marinas are commercial in some respect. Compare *Terrien, supra* (“commercial” is “able or likely to yield a profit”), and ordinance 3.1 (a “marina” offers a service to members). Although defendant claims it is a nonprofit corporation, it charges annual dues in the amount of \$300 for membership. In addition, defendant sold shares in the corporation. The proceeds of membership and from the sale of stock were used to construct and operate the marina and community center. Moreover, defendant and its members profit from enjoyment of the lakefront. Consequently, defendant is able or likely to profit from sale of the stock, and defendant’s use of the property is a commercial enterprise. See *id.*

Therefore, defendant’s actions in violating the zoning ordinances also constitute a nuisance per se. *Indian Village Ass’n v Shreve*, 52 Mich App 35, 37; 216 NW2d 447 (1974), cited in *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). A nuisance per se is a “a nuisance at all times and under any circumstances, regardless of location or surroundings.” *Hadfield v Oakland Co Drain Comm’r*, 430 Mich 139, 151; 402 NW2d 225 (1988), overruled on other grounds, *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). In my view, it is a nuisance per se to have the “noise,” “unsightly condition,” and “excessive traffic” – see ordinance 3.1 – incident to twenty boats and families going in and out of a piece of property and a lake in a residential area. *Hadfield, supra*. Whether there are other parcels of property in violation of the zoning ordinance in a similar manner is of no consequence to the present action. Clearly not every resident on Higgins Lake would be permitted to turn their property into a marina for multiple families and watercraft. That is precisely the situation zoning laws protect against and the very definition of a nuisance. See ordinance 6.1 *et seq.*, and 3.1; *Hadfield, supra*.

IV. CONCLUSION

Given the way I would resolve this case, it is unnecessary for me to discuss the remaining issues.

I would affirm the trial court’s decision in part and remand in part for further proceedings consistent with this opinion.

/s/ Peter D. O’Connell